OLC RECORD COPY

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21 December 1978

MEMORANDUM FOR: General Counsel

FROM : Chief, Legislation Staff
Office of Legislative Counsel

SUBJECT : Zurcher v. Stanford Daily

1. Attached for your information are copies of: (1) The White House Press Office background report on the President's legislative proposal; (2) Prepared testimony given by Assistant Attorney General Philip Heymann before the Senate Judiciary Constitution Subcommittee on 19 December, and; (3) Editorial comment on the issue. There is as yet no actual draft bill.

2. I would appreciate your views as to whether the proposal adequately deals with national security considerations.

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Limiting Searches of the Innocent

WASHINGTON POST 17 DEC 1978

THE LEGISLATION proposed by President Carter Tuesday is an important step toward repairing some of the damage done to the right of individual privacy by the Supreme Court last spring. It would sharply limit the powers of police—federal, state and local—to search the files of the news media and of others who are preparing material for publication. By doing so, it would provide those groups with the kind of protection they need against unwarranted rummaging in their files without significantly diminishing the ability of the police to gather evidence in criminal cases.

The Supreme Court made such rummaging possible when it ruled that police may constitutionally search the files of any individual, whether suspected of criminal activity or not, if there is reason to believe they will find evidence of a crime. We, along with many others, have argued that this seriously threatened the ability of the press to investigate governmental and other kinds of wrongdoing. The danger was that confidential notes could be exposed to the eyes of malevolent or overzealous police as they searched for evidence concerning other matters. Fortunately, this argument has been taken seriously by the president and Attorney General Griffin Bell, some of whose comments on the subject are printed, For the Record, on this page today.

The administration's proposal would prohibit almost all searches through the "work product"—notes, photographs, interview files, etc.—of anyone preparing material for dissemination to the public. That would include, in addition to journalists, academicians, professional free-lance writers and anyone else preparing an article or a broadcast. Such material could be searched only if a judge had been convinced that its owner was a suspect in a crime or that a death or serious injury would occur if an immediate search were not conducted.

Police and prosecutors might still have access to the files of journalists and other authors. But their only access to the material would be by way of a subpoena. That would give journalists an opportunity to have their objections heard by a judge before they surrendered their confidential notes.

The proposed legislation would also require prosecutors to proceed via a subpoena if they believed a journalist's files to contain direct evidence of a crime, such as a ransom note. Searches for that kind of evidence without prior notice could be conducted—beyond the curcumstances outlined above—only if there were danger that the material might be destroyed.

If Congress accepts this proposal, or some refinement of it, the problem the Supreme Court's decision created for the press will be greatly relieved. But the problem the decision created for others will not be. The government has no business searching the belongings of lawyers, doctors, teachers or any other citizen for evidence that someone else committed a crime. The same kind of rules that apply to the press should apply to others who may possess confidential information.

Fortunately, the Department of Justice does recognize that the searches of innocent third parties infringe on individual privacy, and it says it will continue to study the situation. But even if it concludes that something should be done, it is not likely to propose legislation that would be effective against state and local police. That is because the federal government has no direct constitutional authority over them. The Justice Department believes the federal power over interstate commerce provides the necessary jurisdiction for the statute the administration is proposing, but it doubts that power provides the necessary basis for broader legislation. If it is right, that broader legislation will have to come out of each of the 50 state legislatures. Until it does, no one's private papers will be secure against the prying eyes of zealous officers.

NEW YORK TIMES

Putting a Stop to Surprise Searches

The Carter Administration has taken a welcome first step toward shoring up some First Amendment freedoms that suffered severe blows from the Supreme Court last May. In a case involving the Stanford University newspaper, the Court then held that police may conduct surprise searches of newspaper offices for evidence of crime even when the occupants are not themselves suspected of wrongdoing.

In this case, the police had reason to believe that the newspaper possessed unpublished photographs of campus violence. Instead of obtaining a subpoena for the pictures, which would have given the newspaper a chance to object, the police simply moved in and searched, heedless of the risks of exposing confidential material.

This kind of intrusion is by no means limited to the news media; it could apply as well to other law-abiding persons with a need to keep confidential files, like doctors, lawyers and scholars. The Court decision thus prompted widespread criticism and a flood of corrective bills in Congress. We continue to favor a broad-spectrum remedy that will safeguard the privacy of all innocent citizens, not only journalists. The Administration's proposal, though it does not address the ordinary citizen's right to be secure from such searches, does embrace the work of scholars, freelance writers and others preparing material for publication in interstate commerce — including their notes, pictures, unused film and interviews. The statute would govern state and local police as well as Federal agents.

Still, some trouble spots remain, like the exceptions to the proposed safeguards. One exception would be writers suspected of crime; who would decide what "suspect" or "crime" means? There are other ambiguities. How, for example, does the proposed law relate to the espionage and national security statutes? These are meant as protection against spies, but they can be turned inward against citizens who are trying to write about national defense matters. A journalist who possesses documents about missile-cost overruns may be under this proposal, a person in possession of Government secrets that would make him or her subject to a search. The Administration may allay such doubts when the Justice Department further explains its proposal in Senate hearings next week.

The Administration says it did not propose broader safeguards because of constitutional and policy questions that require further study. Congress should weigh them, too. The goal should be a law, with the fewest possible loopholes, that eliminates or tightly regulates the kind of search that took place at Stanford. No sure judgment is possible until the questions are put to rest, but for the moment, the Administration's proposal seems a major advance toward that goal.